

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001006-MR

HAROLD L. THOMPSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 97-CR-01110

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE. Harold L. Thompson (Thompson) appeals the Fayette Circuit Court's denial of his RCr 11.42 motion alleging ineffective assistance of counsel. Finding no error, we affirm.

The particular facts of this case are set out in detail in an unpublished opinion, Thompson v. Commonwealth, No. 1998-SC-0219-MR (Ky. rendered May 18, 2000) (direct appeal by Thompson in which the Kentucky Supreme Court affirmed Thompson's conviction on the grounds asserted). Briefly summarized,

Thompson was operating a motorcycle on the wrong side of the road at a speed of at least 10 miles over the posted speed limit (35 mph) in a residential neighborhood when he struck nine-year-old Autumn Roaden, causing her death. According to Thompson, he did not see Autumn, who was running across the street, prior to striking her. After striking Autumn, Thompson kept going and when Autumn's body eventually fell off the front of the motorcycle, Thompson ran over her. Thompson then fled the scene on the motorcycle without stopping. Blood tests performed two to three hours after the accident indicated that Thompson had a .10 blood alcohol level, and urine tests showed the presence of marijuana, a prescription pain reliever and anti-depressant medication. After a trial, a jury convicted Thompson of reckless homicide and being a first-degree persistent felony offender.

Thompson filed a direct appeal in which he argued the following: (1) the trial court abused its discretion by denying his motion for a directed verdict; (2) Thompson's two prior felony convictions should have counted as only one prior conviction for purposes of PFO sentencing enhancement; (3) an emergency room technician is not qualified to draw blood samples under KRS 189A.103(6); (4) a chemist with seven years of experience in alcohol and drug screens is not qualified to testify regarding the absorption and elimination of substances

in the body; (5) the trial court abused its discretion in allowing an accident reconstructionist to testify regarding the average running speed of children; (6) the trial court erred by excluding evidence that Thompson had once saved a child from a burning building; and (7) finally, the trial court should not have allowed graphic photographs of the victim's body to be posted for the jury's viewing during the medical examiner's testimony. A majority of the Kentucky Supreme Court affirmed the trial court on all the grounds asserted. However, Justice Cooper filed a dissenting opinion in which Justice Stumbo joined.

In his dissenting opinion, Justice Cooper held that the opinions of the accident reconstructionist, Officer Sims, were premised upon inadmissible hearsay and should have been suppressed. In discussing this conclusion, Justice Cooper revealed an error that Officer Sims had made in his estimation of Autumn's running speed. Specifically, after reconstructing the scene and approximating Autumn's running speed based on a study out of England, Sims opined that if Thompson had applied his brakes when Autumn left the curb, Thompson would have been able to stop his motorcycle 29.96 feet short of hitting Autumn. However, Sims made an error in calculating Autumn's speculated running speed. When figured correctly, the result is that

Thompson would not have been able to stop in time to avoid hitting Autumn.

On September 5, 2001, Thompson filed a motion to vacate his sentence under RCr 11.42. The trial court conducted an evidentiary hearing on April 24, 2002, and Thompson's trial counsel was the Commonwealth's sole witness. At the conclusion of the hearing, the trial court denied Thompson's motion, precipitating this appeal.

In denying Thompson's motion, the trial court found as follows: The trial court presided over Thompson's trial. Having sat through the entire trial, in the trial court's opinion, the most crucial and undisputed evidence against Thompson was that he "took off" after the accident and initially lied to the police about his involvement. The trial court found that these actions were inconsistent with Thompson's trial testimony that the collision was a total accident. In other words, if Thompson had had no alcohol or drug problem at the time he struck Autumn with his motorcycle, he would have stayed at the scene. In the trial court's opinion, a person stays unless that person has something to hide. As to whether trial counsel's performance was deficient, the trial court found that Thompson's attorney put on a vigorous defense. Moreover, trial counsel was attentive and missed no objections that he should have made. Finally, the trial court did not believe that

Thompson's trial counsel presented a misguided theory of the case.

In this appeal, Thompson alleges that he was denied constitutionally effective assistance of counsel. The test for proving ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Strickland test requires Thompson to show trial counsel's performance was deficient, and this deficient performance prejudiced his defense. Strickland, 466 U.S. at 687, accord Gall v. Commonwealth, Ky., 702 S.W.2d 37 (1985). In reviewing claims of ineffective assistance of counsel, "[t]he critical issue is not whether counsel made errors but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory." Haight v. Commonwealth, Ky., 41 S.W.3d 436, 441 (2001) (citing United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992)).

As to the first prong of the Strickland test, in order to show that counsel's performance was deficient, the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thompson argues that his counsel was ineffective for failing to retain an independent expert to review the expert opinion of Officer Sims. In the alternative, Thompson argues that his trial counsel was

ineffective for failing to discover by his own accord the erroneous calculation upon which Officer Sims based his opinion that Thompson had enough time to stop his motorcycle to avoid hitting Autumn.

In the RCr 11.42 hearing, Thompson's trial counsel testified that he reviewed Officer Sims' conclusion, but did not identify the error in one of the initial calculations. Further, in light of his client's statements that he did not see Autumn prior to striking her with his motorcycle, Thompson's trial counsel did not feel that an independent review of Sims' reconstruction was necessary as it was premised on the assumption that Thompson saw the child. The trial theory was that Autumn's death was the result of an unavoidable accident, and the trial court found that Thompson's attorney did function as the counsel guaranteed by the Sixth Amendment in advancing this defense. We conclude there was no abuse of the trial court's discretion in ruling that Thompson did not show that his attorney's performance was deficient for failing to find the mathematical error or for choosing not to hire an independent expert to review Sims' calculations.

While the correct calculation may have strengthened Thompson's defense somewhat, the trial court found at the conclusion of the RCr 11.42 hearing that testimony of Thompson's fleeing the scene and lying to the police about his involvement

undermined his defense. The implication of this finding is that even if Thompson had shown that his counsel's representation was deficient, Thompson did not show prejudice, the second prong of the Strickland test. We must recognize the trial court's superior position to judge the credibility of witnesses and the weight to be given their testimony. See McQueen v. Commonwealth, Ky., 721 S.W.2d 694, 698 (1986).

Contrary to Thompson's assertions, the Commonwealth presented evidence other than Sims' allusion to normal reaction times that Thompson was intoxicated at the time of the accident. Moreover, it was undisputed that Thompson was speeding in a residential neighborhood and driving on the wrong side of the road when he hit Autumn. Finally, Thompson never stopped after he struck Autumn and gave a false statement to the police immediately after the accident. Under these circumstances and assuming for the sake of argument that Thompson's trial counsel was deficient, we cannot conclude that Thompson showed this deficient performance prejudiced his defense during either the guilt or sentencing phase of the trial.

For the foregoing reasons, the trial court's denial of Thompson's motion for RCr 11.42 relief is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard E. Neal
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky